IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-201

MARK BRIAN PRICE,

Petitioner,

vs.

PETER J. PITCHESS, SHERIFF
OF LOS ANGELES COUNTY,
STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE WARREN BURGER AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Mark Brian Price, respectfully petitions for a writ of certiorari directed to the United States Court of Appeals for the Ninth Circuit to review and reverse the judgment of the

court below for lack of jurisdiction of both the person and the subject matter.

This is the second petition for writ of certiorari in this Court, the first one being No. 72-1523, October Term, 1972, directed to the Superior Court of the State of California for the County of Los Angeles, and denied without opinion October 9, 1973. This Court has held that the denial of certiorari "imports no expression of opinion upon the merits of the case". (House v. Mayo, 324 US 42, 48, 89 L.ed. 739; Ex parte Abernathy, 320 US 219, 88 L.ed. 3) No res judicata or precedential effect follows. (Brown v. Allen, 344 US 443, 457, 97 L. ed. 469, 488, 489).

The issues involved in this case were presented to the state court originally and denied by the Court of Appeals and the Supreme Court of California, before a petition for writ of habeas corpus was filed in the United States District Court, Central District of California.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1257, U.S. Codes, and by Title 18, Section 3182, et seq., U.S. Codes; Appellate Rules 22, et seq.; the Constitution of the United States, Article 4, Section 2; Rules of Evidence, Rule 1101; Habeas Corpus under Section 2241-2254 of Title 28, U.S. Codes; Rules of Evidence, Rule 201 re Judicial Notice; the Fourteenth Amendment to the Constitution of the United States, Section 1.

Petitioner has exhausted all his

state court remedies.

OPINIONS BELOW

A petition for a writ of habeas corpus re extradition of petitioner was filed in the Superior Court of the State of California for the County of Los Angeles, the first court of original jurisdiction of habeas corpus proceedings. It was denied on January 29, 1973.

A petition for writ of habeas corpus was filed in the Court of Appeal of the State of California on March 1, 1973, the second court having jurisdiction of habeas corpus, and denied without opinion on March 6, 1973. A copy of said order is attached hereto as Appendix "A".

Thereafter, a petition for hearing was filed in the Supreme Court of California, the highest court of the state, on March 16, 1973, and denied by that court on April 4, 1973. A copy of said order is attached hereto as Appendix "B".

A petition for writ of certiorari was filed in the Supreme Court of the United States directed to the Superior Court of the State of California for the County of Los Angeles and was given No. 72-1523 of this Court, October Term, 1972, and denied October 9, 1973.

Another petition for writ of habeas corpus alleging violations of the petitioner's constitutional rights under the laws of the United States was filed in the United States District Court for the Central District of California, No. 73-829-RJK, entitled Mark Brian Price v.

Peter J. Pitchess, Sheriff of Los Angeles County, State of California. Chief Judge Albert Lee Stephens, Jr., granted a stay of execution April 13, 1973. The District Court denied the writ on December 12, 1973, a copy of which is attached hereto as Appendix "C". A motion for reconsideration was denied on January 31, 1974, a copy of which denial is attached hereto as Appendix "D".

Petitioner duly filed notice of appeal on February 6, 1974.

On June 28, 1974 the United States District Court signed its judgment denying petition for habeas corpus and ordered its filing nunc pro tunc as of February 1, 1974. (Appendix "E")

The United States Court of Appeals for the Ninth Circuit heard oral argument and rendered its decision on May 16, 1977, revised July 7, 1977. A copy of said decision dated May 16, 1977 is attached hereto as Appendix "F"; a copy of said revised decision dated July 7 1977 is attached hereto as Appendix "G".

A petition for rehearing was duly filed and denied on July 11, 1977, a copy of which is attached hereto as Appendix "H".

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The Constitution of the United States, Article 4, Section 2; the Constitution of the United States, Fourteenth Amendment, Section 1; Title 28, Section 1257, U.S. Codes; Title 28,

Sections 2241-2254, U.S. Codes; Title 18, Sections 3182, et seq., U.S. Codes; Appellate Rules 22, et seq.; Rules of Evidence, Rules 201 and 1101.

STATEMENT OF FACTS

Mark Price was originally arrested in Utah and charged with possession of hallucinogenic drugs for sale in the Justice Court for the South Precinct, County of Davis, State of Utah. He posted bail of $4,000 and was arraigned there on November 25, 1969.

A motion was made in the Utah court to suppress the evidence, on the grounds of illegal search and seizure, which motion was heard and taken under advisement. On January 15, 1970 the court heard further arguments on a motion to dismiss and ordered the evidence obtained by the search warrant suppressed. The County Attorney then moved to dismiss all charges since he stated there was no other evidence than that which was suppressed by the court.

Following the hearing on January 15, 1970, Mark Price left the State of Utah believing that the matter had been dismissed and finally disposed of.

On January 23, 1970 the court in Utah received a notice of appeal from the prosecuting agency and sent all proceedings on February 2, 1970 to the District Court. A motion to dismiss the appeal was filed in the District Court of Davis County, State of Utah, by the Utah attorney for petitioner. On December 29, 1970, the Utah court having considered

the motion to dismiss the appeal and the authorities in support thereof and in opposition thereto, and being fully advised, found that the motion to dismiss should be and the same was granted by the Honorable Thornley K. Swan, Judge, on the basis of a motion to dismiss on the ground that where a prosecuting agency had made a motion to dismiss it could not thereafter appeal, citing Hartman v. Weggeland, 19 Utah 2d 229, 429 P.2d 978.

Price came to Los Angeles immediately, having been cleared of the Utah charge with finality, and was not a fugitive fleeing from a charge in that state.

It is a fair inference that the prosecutor in Utah was unhappy with the outcome, which resulted from his own conduct in the handling of the case and the lack of any merit in the prosecution's case. He thereafter sought another warrant of arrest for Mark Price, in spite of the fact that he had stated there was no other evidence than that which had been presented to the court and suppressed and the dismissal which had received the approval of the Utah appellate court. The new warrant was issued on January 26, 1970, charging the same offense of unlawful sale of hallucinogenic drugs on November 19, 1969. Appellant was arrested on November 30, 1972 at Burbank (Los Angeles County), California. On December 12, 1972 Utah authorities filed a fugitive complaint in the Municipal Court of Los Angeles Judicial District, seeking the extradition of petitioner. Petitioner then attempted to obtain habeas corpus relief

from the state courts of California, which was denied before the United States Supreme Court.

The present habeas corpus petition was filed on April 13, 1973 and a supplement was filed on November 14, 1973, alleging that petitioner was deprived of his liberty under the Fourth, Fifth, Sixth and Fourteenth Amendments, U.S. Constitution, Article I, Section 13, California Constitution, the Full Faith and Credit Clause of the United States Constitution, Article 4, Section 1, and Article 4, Section 11, Clause 2, United States Constitution, and a denial by the Governor of a plea not to be extradited and not to sign a Governor's extradition warrant, all of which were denied.

Petitioner contends that he was not a fugitive when he left Utah, after the state had presented its case and had both trial and appellate courts rulings in his favor, and that he should not be created a fugitive ex post facto, so to speak, by a new complaint charging the same transaction, brought on by an unhappy prosecutor. He was not and is not subject to extradition under the provisions of Title 18, Section 3182, U.S. Codes. He further contends and contended that the Fourteenth Amendment to the Constitution of the United States and the Bill of Rights protect him from a second run by the State of Utah which amounts to double prosecution forbidden by the Fifth Amendment to the Constitution of the United States, and he was entitled to a speedy trial and determination of the issues speedily. He also asserts that he is protected by the privileges and

immunities clause and the due process and equal protection clauses of the Fourteenth Amendment and pursuant to those provisions he has the right to have the state of his residence determine those rights. He further contends that to permit his extradition would violate those rights of due process and equal protection of the laws and to a hearing in the state of his residence to determine whether there was probable or any cause to remove him.

Petitioner contends that the court lacks jurisdiction to order him extradited if extradition is governed by the Fourteenth Amendment to the Constitution of the United States and the due process and equal protection clauses of the Fifth Amendment, and that he is entitled to a full evidentiary hearing at the place of his residence in California on the issue of probable cause to issue an extradition warrant based on the facts of this case and which hearing is granted in Great Britain by the House of Lords before a British subject is allowed to be extradited. See: Armah v. Government of Ghana and Another (1966), 3 All England Law Reports (H.L.) 177.

Petitioner contends that the Fourth Amendment, U.S. Constitution, and the requirement of probable cause to seize anyone under its provisions must be applied to determine whether an extradition warrant, like any other warrant, is valid.

Petitioner contends that the failure of the State of California to determine that probable cause existed for an

extradition warrant and that the approval of the State of Utah was, in effect, a rubber stamp and that there was no jurisdiction for an extradition warrant and that the warrant violated the Fourth Amendment, U.S. Constitution. He further contended that the complaint, without a supporting affidavit showing probable cause, violated the Fourth Amendment; that the complaint did not state any facts nor did it allege that it was made by anyone on their personal knowledge of the matters alleged in the complaint.

Petitioner further contends that he was not a fugitive; that the State of Utah has had its day in court and was seeking a second run because the court had ruled against it; and petitioner further contends that the State of Utah is barred by the principles of double jeopardy, guaranteed by the Fifth Amendment, U.S. Constitution, and the principles of res judicata and collateral estoppel. He further contends that the Bill of Rights applies to extradition proceedings the same as any other proceedings and that he is entitled to full faith and credit and to have all of his rights determined in the State of California before he is stripped from his job and forcibly removed to another state.

Petitioner also contends that under the Constitution and laws of the United States, he is entitled to have the determination upon the lawfulness or unlawfulness of his arrest by means of writ of habeas corpus. (Ex parte Royall, 117 US 241, 251, 29 L.ed. 868, 871) He contends that, being a resident

and citizen of the State of California, he is entitled to the determination by his state of constitutional rights by petitions for writs of habeas corpus in the State of California and to have a hearing and judicial determination of his rights in the courts of this state. (Thompson v. Continental Ins. Co., 66 Cal.2d 738) He further contends that when a foreign state is seeking extradition, they must give full faith and credit to a judicial proceeding in the state of residence of a petitioner and must comply with due process administered by the state of residence.

Petitioner contends that where a person has been prosecuted for an offense and the whole criminal process has been completed and the case dismissed and the defendant discharged, that when the defendant thereupon leaves the state he is not a "fugitive from justice".

QUESTIONS PRESENTED

1. Whether there is jurisdiction to arrest a defendant and hold him for extradition when the warrant of arrest and the procedure fail to show probable cause for the issuance of the warrant pursuant to the guarantees of the Fourth and Fourteenth Amendments, U.S. Constitution.

2. Whether a defendant in an extradition proceeding is entitled to all the rights and remedies guaranteed by the Bill of Rights, including probable cause (Fourth Amendment), double jeopardy, res judicata (Fifth Amendment), estoppel and also speedy trial (Sixth

Amendment).

3. Whether the defendant in an extradition proceeding is entitled to all the rights guaranteed by the Fourteenth Amendment (Section 1) to the Constitution of the United States, including the privileges and immunities clause, due process of law and equal protection of the laws of the state of his residence.

4. Whether a citizen of one state ceases to be a fugitive from justice when the state seeking to extradite him has held legal proceedings in which the defendant is discharged by the trial court and affirmed in the appellate courts of the state seeking extradition, after a full hearing on the case.

5. Whether such an accused ceases to be a fugitive from justice when his case is dismissed and he leaves the state without any restriction or charges against him and his bail is exonerated.

6. Whether the decisions of the court below are in conflict with Moore v. Arizona, 414 US 25, 38 L.ed.2d 183, and with Ex parte Royall, 117 US 241, 251, 29 L.ed. 868, 871, and with Rule 1101 of the Rules of Evidence (the section re habeas corpus).

7. Whether the Fourteenth Amendment to the Constitution of the United States, Section 1, now governs extradition proceedings and does not limit inquiry for habeas corpus in extradition proceedings, but requires a full hearing to determine all the rights guaranteed by the due process and equal

protection clauses and the privileges and immunities sections of the Fourteenth Amendment.

8. Whether the decision of the Court of Appeals is in conflict with the speedy trial section of the Constitution guaranteed by the Sixth Amendment to the Constitution of the United States.

9. Whether the Court of Appeals' decision is in conflict with Ashe v. Swenson, 397 US 436, 25 L.ed.2d 469, and whether the federal rules of collateral estoppel, which is embodied in the Fifth Amendment's guarantee against double jeopardy, makes a second trial wholly impermissible.

10. Whether the issues of fact in extradition proceedings are to be applied under the law of the forum where the petitioner resides rather than the law of the demanding state.

REASONS FOR GRANTING THE WRIT

Habeas corpus is an appropriate remedy for testing extradition proceedings. (Ex parte Royall, 117 US 241, 251, 29 L.ed. 868, 871; U.S. v. Rauscher, 119 US 409, 30 L.ed. 425)

Habeas corpus lies to examine the facts on which a conviction in a state court rests. (Moore v. Dempsey, 261 US 86, 67 L.ed. 543; Johnson v. Zerbst, 304 US 458, 82 L.ed. 1461; Mooney v. Holohan, 299 US 103, 79 L.ed. 791)

In Roberts v. Reilly, 116 US 80, 29 L.ed. 544, the Court said that in an

extradition proceeding the lawfulness can be tested by habeas corpus and what must appear before the requisition can be complied with. The Court held that it must appear to the Governor of a state to whom a demand for an alleged fugitive from justice is presented, before he can lawfully comply with the demand: 1, that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled, by an indictment or an affidavit certified as authentic by the Governor making the demand; 2, that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand.

The petitioner was charged in a complaint dated January 26, 1970, with unlawful sale of hallucinogenic drugs on November 19, 1969. There was no affidavit filed or submitted in support of the complaint. The complaint was sworn to by Ron Ballantyne and a warrant of arrest was issued on January 20, 1970. Again, there was no affidavit filed or submitted in support of the warrant, as required by the Fourth Amendment, U.S. Constitution. The affidavit which accompanied the extradition papers was made out by David Van Zile, a police officer from Midvale City, Salt Lake County, Utah, and was sworn to on the 3rd day of January 1972, two years after the complaint was issued and hence did not comply with the Fourth Amendment to the Constitution of the United States to establish probable cause for the issuance of a complaint and the extradition warrant at the time they were issued. Hence, the warrant and the complaint were on their face

insufficient. (Aguilar v. Texas, 378 US 108, 12 L.ed.2d 723; Spinelli v. U.S., 393 US 410, 21 L.ed.2d 637; Whiteley v. Warden of Wyoming Penitentiary, 401 US 560, 28 L.ed.2d 306)

As stated in Roberts v. Reilly, 116 US 80, 29 L.ed. 544, the first prerequisite for an extradition is a question of which is open on the face of the papers to judicial inquiry. The affidavit of David Van Zile, made two years after the complaint was issued, was not and could not be in support of it.

Where allegations of habeas corpus petitions raise constitutional claims, the United States courts, including those located at one's residence, have the power and the duty to consider every federal constitutional claim presented. (Fay v. Noia, 372 US 391, 9 L.ed.2d 837)

The decision of the Court of Appeals limiting the scope of extradition is in conflict with later rulings and particularly Moore v. Arizona, 414 US 25, 38 L.ed.2d 183, where the defendant was serving a prison term in California when he was extradited and removed to Arizona approximately three years and twenty-eight months after he demanded a trial, alleging deprivation of his Sixth and Fourteenth Amendment rights to a speedy trial. This Court granted certiorari, holding that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. (Klopfer v. North Carolina, 386 US 213, 223, 18 L.ed.2d 1) This Court recognized the constitutional right and granted its hearing reversing the state court's holding denying his constitutional right

to a speedy trial and remanded the case back to the Arizona court to reassess petitioner's case under the speedy trial standard of the Sixth Amendment as mandated by Smith v. Hooey, 393 US 374, 383, 21 L.ed.2d 607, Barker v. Wingo, 407 US 514, 33 L.ed.2d 101, and Dickey v. Florida, 398 US 30, 26 L.ed.2d 26.

In the case at bench, the Court of Appeals refused to consider the speedy trial claim of petitioner herein, which dates back to the charge made in 1970 and an alleged occurrence on November 19, 1969. The Court of Appeals therefore erred when it said that all previous attempts to raise the Bill of Rights in habeas corpus proceedings before federal courts sitting in the asylum state have been unsuccessful. If they have been, then we believe this Court should grant certiorari to determine whether the Fourteenth Amendment, Section 1, requires both the state and federal governments in extradition proceedings to apply the provisions of the Bill of Rights.

Article 4, Section 2 of the Constitution provides "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The right to remove from one place to another is an attribute of personal liberty and is secured by the Fourteenth Amendment and by other provisions of the Constitution. It is a right of national citizenship. (Slaughterhouse cases, 16 Wall. 36, 79, 21 L.ed. 394, 409; Twining v. New Jersey, 211 US 97, 53 L. ed. 97; Edwards v. California, 314 US 160, 178, 181, 183, 86 L.ed. 119, 127, 130) As such, it is protected against state action by the privileges and

clause of the Fourteenth Amendment. It is a part of the citizens' liberty within the meaning of the due process clause of the Fifth Amendment.

The limitation on the right of free movement applies only when a citizen is a fugitive from the law.

No person can or should be extradited from one state to another unless the order falls within the constitutional provision. The Fourteenth Amendment provides in Section 1 as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourteenth Amendment mandates that no person shall be deprived of liberty without due process of law. The Bill of Rights contains a provision against double jeopardy by virtue of the Fifth Amendment incorporated into the Fourteenth Amendment. The Fourteenth Amendment mandates recognition of the double jeopardy issue in federal habeas corpus proceedings, contrary to the arguments of the court against applying the Bill of Rights in habeas corpus

proceedings before federal courts sitting in asylum states.

The Fifth Amendment's guarantee against double jeopardy protects a man who has been acquitted from having to "run the gauntlet" a second time. The principle of collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and binding judgment, that issue cannot again be litigated between the same parties in any future lawsuit. (Ashe v. Swenson, 397 US 436, 25 L.ed.2d 469)

This Court said in the Ashe case:

> "In Benton v Maryland, 395 US 784, 23 L Ed 2d 707, 89 S Ct 2056, the Court held that the Fifth Amendment guarantee against double jeopardy is enforceable against the States through the Fourteenth Amendment. The question in this case is whether the State of Missouri violated that guarantee when it prosecuted the petitioner a second time for armed robbery in the circumstances here presented. (397 US 436, 25 L.ed.2d 471)
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> * * *
>
> "The doctrine of Benton v. Maryland, 395 US 784, 23 L Ed 2d 707, 89 S Ct 2056, puts the issues in the present case in a perspective quite different from that in which the issues were perceived in Hoag v New Jersey, supra. The question is no longer whether collateral estoppel is a requirement of due process, but whether it is a part of the Fifth Amendment's guarantee against double jeopardy. And if collateral estoppel is embodied in that guarantee, then its applicability in a particular case is no longer a matter to be left for state court determination within the broad bounds of 'fundamental fairness,' but a matter of constitutional fact we must decide through an examination of the entire record. Cf. New York Times Co. v. Sullivan, 376 US 254, 285, 11 L Ed 2d 686, 709, 84 S Ct 710, 95 ALR2d 1412; Niemotko v Maryland, 340 US 268, 271, 95 L Ed 267, 270, 71 S Ct 325; Watts v Indiana, 338 US 49, 51, 93 L Ed 1801, 1804, 69 S Ct 1347; Chambers v Florida, 309 US 227, 229, 84 L Ed 716, 718, 60 S Ct 472; Norris v. Alabama, 294 US 587, 590, 79 L Ed 1074, 1077, 55 S Ct 579)." (397 US 443, 25 L.ed.2d 475)

The principle of res judicata is applicable to decisions of criminal courts as to those of civil jurisdiction. (Frank v. Mangrum, 237 US 309, 59 L.ed. 969, 983)

The doctrine of res judicata required that the government be foreclosed by the result in the first trial. (U.S. v. Adams, 281 US 202, 74 L.ed. 807; Sealfon v. U.S., 332 US 575; U.S. v. Oppenheimer, 242 US 85, 87,61 L.ed. 161, 164; U.S. v. De Angelo, 138 F.2d 466)

The Fifth Amendment to the Constitution of the United States prohibition against double jeopardy: Green v. U.S., 355 US 184.

The Sixth and Fourteenth Amendment right to speedy trial: U.S. v. Provoo, 350 US 857, 100 L.ed. 761; U.S. v. Marion, 404 US 307, 30 L.ed.2d 468, and numerous cases cited, including Dickey v. Florida, 398 US 30, 26 L.ed.2d 26; Smith v. Hooey, 393 US 473, 21 L.ed.2d 647; Klopfer v. North Carolina, 386 US 213, 18 L.ed.2d 1)

As stated by the United States Supreme Court in U.S. v. Oppenheimer, 242 US 85, 61 L.ed. 161, 164:

> "... one judgment that he is free as a matter of substantive law is as good as nother ... and however it was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution. ..."

One who has appeared in court and has submitted himself to the court where he was accused and the case there dismissed, and where the state thereafter appeals and their appeal was rejected and the case terminated, the defendant, having been freed by the judgment of the court, could not be said to be a fugitive thereafter on a new complaint charging the same offense. He was no more a fugitive than was the defendant in a different setting not in the State of Tennessee when arrested in the State of New York for the crime of grand larceny and false pretenses, charging that he was a fugitive from the justice of that

state. (Hyatt v. New York, 188 US 692, 47 L.ed. 657) In the Hyatt case, the Court said that before the Governor has a right to issue his warrant it must appear to the Governor before he can lawfully comply with the demand for extradition that the person demanded is substantially charged with a crime against the laws of the state from whose justice he is alleged to have fled by an indictment of an affidavit, etc., and that the person demanded is a fugitive from the justice of the state, the executive authority of which makes the demand. It was also stated in the same case that the question whether the person demanded is substantially charged with a crime or not is a question of law and open upon the face of the papers to judicial inquiry upon application for discharge under the writ of habeas corpus. In that case, the Court said that that appellant was entitled to insist upon proof that he was within the demanding state at the time he is alleged to have committed the crime charged and subsequently withdrew from her jurisdiction so that he could not be reached by the criminal process.

Petitioner in this case contends that he is in fact not a fugitive from justice of the demanding state and that the papers presented to the Governor of California were not competent proof that he was in fact a fugitive from the justice of Utah, which cleared him and lawfully dismissed him from custody.

In Ex parte Spears, 88 Cal. 640, the court, taking recognition of the law set out in Roberts v. Reilly, 150 US 95,

challenges the affidavit regarding an event within twelve months of the making of the affidavit, whereas in the instant case there was no affidavit until more than two years after the alleged transaction. The complaint and the other papers in the instant case were insufficient as a matter of law to issue any extradition in this case.

The cases cited by the court in opposition to its consideration of the Bill of Rights are in no wise like the petitioner's in this case. None rests its claim upon acquittal or collateral estoppel or res judicata. In the case of Watson v. Montgomery, 431 F.2d 483, et seq., the defendant was charged with murder and conspiracy in what was known as the Tate-La Bianca case. The defendant had not been tried and no issue of once in jeopardy or collateral estoppel was involved, nor was there any issue of speedy trial or lack of proper papers, including a valid complaint or indictment. In fact, Watson was indicted.

The case of Sweeney v. Woodall, 344 US 86, 97 L.ed. 114, involved unconstitutionality of his treatment by Alabama in the courts of that state.

In another case, Johnson v. Matthews, 182 F.2d 677, the issue was whether he could get fair treatment in the courts of Georgia.

In the case of Wood v. Cronvich, 396 F.2d 142, the issue was the unconstitutionality of the Ohio indictment.

In Vitiello v. Flood, 374 F.2d 544,

there was conflicting evidence and there was a finding of probable cause.

None of the cases cited involved double jeopardy, collateral estoppel or due process of law. The case of Johnson v. Matthews, 182 F.2d 677, cited by the Court of Appeals, does raise the issue of speedy trial, but the court does not distinguish it from the case of Moore v. Arizona, 414 US 25, 38 L.ed.2d 183, in which this Court did consider the denial of a speedy trial and remanded the case for consideration. Nor does the Court of Appeals, in its opinion, discuss or explain why that court is not controlled by the Fourteenth Amendment to the Constitution of the United States and the Bill of Rights as incorporated in that amendment and applied to the states.

This case raises important questions of the application of the Bill of Rights to extradition proceedings which should be passed on by this Court. If the Court grants certiorari, it is requested to stay the mandate until the final determination of the case.

WHEREFORE, petitioner respectfully prays that this Court grant its writ of certiorari and reverse the judgment of the Court of Appeals for the Ninth Circuit and hold that petitioner was not a fugitive from justice and could not be extradited, that the provisions of Roberts v. Reilly, 116 US 80, 29 L.ed. 544, were not followed, that the petitioner was denied his Fourth Amendment rights in the failure to consider the lack of probable cause in the moving

papers in this case, and that the State of Utah, having had one run and causing petitioner to run the gauntlet in 1970, could not make him run the gauntlet again in 1977.

Respectfully submitted,

MORRIS LAVINE

Attorney for Petitioner

Of counsel:
Attorney Joan Celia Lavine

APPENDIX "A"
PETITION FOR WRIT OF
HABEAS CORPUS DENIED

2ND CIVIL NO. 23103

Mar 6 - 1973

Denied
Herndon
Fleming
Compton

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

In the Matter of the Application of

MARK BRIAN PRICE

For a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS
AND
MEMORANDUM OF POINTS & AUTHORITIES

(SEAL OF COURT)

COURT OF APPEAL -
SECOND DIST
F I L E D
MAR 1 - 1973
Clay Robbins, Jr.
Clerk

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APPENDIX "B"

Order Due
April 5, 1973

ORDER DENYING HEARING
AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 2, Crim. No. 23103

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN RE PRICE ON HABEAS CORPUS

F I L E D
APR 4 1973
G.E. BISHEL, Clerk

Petition for hearing DENIED.

WRIGHT
Chief Justice

APPENDIX "C"

ENTERED
DEC 14 1973
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

FILED
DEC 12 1973
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MARK BRIAN PRICE, Petitioner, v. PETER J. PITCHESS, SHERIFF OF LOS ANGELES COUNTY, STATE OF CALIFORNIA, Respondent.	CIVIL NO. 73-829-RJK ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

On April 13, 1973, petitioner, a California State prisoner, filed this petition for writ of habeas corpus.

Petitioner was arrested in DAvid County, California, and is presently under the custody of Peter Pitchess, Sheriff of Los Angeles County, pursuant to a fugitive warrant from the State of Utah.

Petitioner states three principal grounds for consideration:

1. That petitioner is not the same person sought by the State of Utah.

2. That petitioner is not a fugitive from justice because the final determina-

tion of a former Utah case bars the present Utah prosecution as double jeopardy.

3. That the delay of approximately three years between issuance of the complaint and arrest warrant and the service thereof in California is a denial of petitioner's right to a speedy trial.

Petitioner's claim that he, MARK BRIAN PRICE, is not the person sought in Utah is prefaced upon the fact that he was named and arrested as BRIAN MICHAEL PRICE in a fugitive warrant in the Municipal Court of Los Angeles Judicial District.

After review of the full record before the court, including a copy of a letter from the Governor of the State of Utah to the Governor of the State of California, requesting the apprehension and delivery of MARK BRIAN PRICE, the Court is satisfied that petitioner is the person sought by the State of Utah and arrested in California for extradition thereto.

The Court is not authorized or prepared to rule on petitioner's second and third claims that former proceedings in Utah should bar the present prosecution there, or that the delay herein denies petitioner's right to a speedy trial. Although it is clear that petitioner has exhausted his available California State remedies as required by 28 U.S.C. Sec. 2254, there is no showing that Utah State remedies have also been exhausted. Where petitioner argues that his Constitutional Rights are threatened by his Utah prosecution, he must show that available Utah State remedies have been

exhausted prior to seeking habeas corpus in the Federal Courts. Sweeney v. Woodall, 344 U.S. 86, 88-90 (1953). There being no such showing in the present case,

IT IS ORDERED that the petition is denied.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve forthwith a copy of this order by United States mail on the petitioner, the Attorney General of the State of California, and the Presiding Judge, Superior Court for the County of Los Angeles.

DATED: December 12, 1973

Robert J. Kelleher
Robert J. Kelleher
United States District Judge

APPENDIX "D"

ENTERED
JAN 31 1974
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

FILED
JAN 31 1974
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

MARK BRIAN PRICE, Plaintiff, v. PETER J. PITCHESS, SHERIFF OF LOS ANGELES COUNTY, STATE OF CALIFORNIA, Defendant.	CIVIL NO. 73-829-RJK MEMORANDUM AND ORDER

This memorandum and order is made upon petitioner's motion for reconsideration of the Court's prior order denying petition for a writ of habeas corpus.

Petitioner was arrested in Davis County, California, and is presently in the custody of Peter Pitchess, Sheriff of Los Angeles County, pursuant to a fugitive warrant from the State of Utah. On April 13, 1973, petitioner filed his petition for writ of habeas corpus, seeking to prevent his extradition to Utah. It was denied by this Court.

Petitioner contends he is not a fugitive from justice for two reasons: (1) he has already been placed in jeopardy once on this charge and cannot be a

fugitive since he cannot be tried for this offense again, and (2) he is not the same person sought by the Utah authorities because the felony fugitive complaint was issued by California authorities against a Brian Michael Price, petitioner's name being Mark Brian Price. He was afforded a further opportunity and hearing to support his contentions but no evidence was taken. An evidentiary hearing must be held only where petitioner's "allegations, if proved at the hearing, would entitle the applicant to habeas relief." Smith v. Idaho, 373 F.2d 149, 156 (9th Cir. 1967) Here, even if all the claims asserted by petitioner were proved by him at an evidentiary hearing, "...this would present only a conflict in the evidence. For extradition purposes, such a conflict is not enought to release the accused." (Smith v. Idaho, supra, at 156.

The issue of double jeopardy is not a proper question for this Court's determination. The existence of a defense to, or a bar of, prosecution in the foreign state court is for that court to decide, and should petitioner be denied relief in that forum, for the determination of the federal court in that state of whether his constitutional rights were thereby infrinted. Woods v. Cronvitch, 396 F.2d 142 (5th Cir. 1968).

As to petitioner's second contention, the discrepancy in the fugitive complaint alone cannot sustain petitioner's burden that he overcome Utah's prima facie showing of fugitivity. Lee Won Sing v. Cottone, 123 F.2d 169, 172 (D.C. Cir. 1941). It is undisputed that the warrant for arrest against petitioner,

issued in Davis County, Utah, the extradition request issued by the Governor of Utah, and the warrant issued by the Governor of California all refer to Mark Brian Price.

Based on the above undisputed facts and the determination of the Governor of California that petitioner is a fugitive from justice and properly extraditable to Utah in accordance with the treaties between those two states, this court finds no constitutional mandate to this Court to intrude upon the Sheriff's custody of petitioner pursuant to the fugitive warrant. See Moncrief v. Anderson, 342 F.2d 902 (D.C. Cir. 1964). Accordingly,

IT IS ORDERED that the petition for reconsideration is denied.

IT IS FURTHER ORDERED that the Clerk of the Court shall send, by United States mail, copies of this memorandum and order to all counsel herein.

DATED: January 31, 1974

Robert J. Kelleher

Robert J. Kelleher
United States District Judge

APPENDIX "E"

ENTERED
JUL 1 1974
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

FILED
JUN 28 1974
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARK BRIAN PRICE, Petitioner, v. PETER J. PITCHESS, Sheriff of Los Angeles County, State of California, Respondent.	)Civil No. 73-829-RJK)JUDGMENT DENYING PETITION FOR HABEAS CORPUS

This Court heretofore on December 14, 1973, made and filed its order denying petition for writ of habeas corpus, and on January 31, 1974, made and filed its memorandum and order denying petitioner's motion for reconsideration. Now, good cause appearing,

IT IS ORDERED that the petition for writ of habeas corpus id enied, and this action should be, and hereyy is, dismissed.

IT IS FURTHER ORDERED that this order be filed nunc pro tunc as of February 1, 1974.

IT IS FURTHER ORDERED that the Clerk of the Court shall send, by United States

mail, copies of this order to all counsel herein.

DATED: June 28, 1974.

Robert J. Kelleher
ROBERT J. KELLEHER
United States District Judge

APPENDIX "F"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK BRIAN PRICE, Petitioner-Appellant, vs. PETER J. PITCHESS, SHERIFF OF LOS ANGELES COUNTY, STATE OF CALIFORNIA, Respondent-Appellee.	)	NO. 74-2940 MEMORANDUM

(May 16, 1977)

Appeal from the United States District Court for the Central District of California.

Before: ELY and TRASK, Circuit Judges, and EAST,* District Judge.

This is an appeal from the district court's denial of appellant's petition for a writ of habeas corpus and from the court's denial of appellant motion for reconsideration.

On November 19, 1969, appellant allegedly sold an hallucinogenic drug, LSD, to a Utah undercover officer. Based on this information and information obtained

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

from a confidential informant, police officers obtained a warrant to search appellant's residence. Evidence seized during the search furnished the basis for a complaint charging appellant with possession of narcotics for sale.

On January 15, 1970, before the City Court of Layton, Davis County, Utah, appellant successfully moved to suppress the evidence seized in the search of his residence. The court dismissed the case on the County Attorney's motion, there being no evidence against appellant other than that which was suppressed. Appellant apparently left Utah that same day.

On January 26, 1970, the complaint presently challenged, charging appellant with unlawful sale of hallucinogenic drugs on November 19, 1969, was issued, and an arrest warrant was obtained. Utah authorities contacted the FBI on March 18, 1970, and requested their assistance in locating appellant. On March 31, it was learned that appellant was probably in the Los Angeles area. Appellant was arrested on April 30, 1972, by an FBI agent in Burbank, California. At the time of his arrest appellant produced a Hawaii driver's license and a social security card bearing the name "Taylor Evan Craig." He stated that he was using that name and that the Hawaiian address on his license was his last permanent residence.

On December 12, 1972, Utah authorities filed a fugitive complaint in the Municipal Court of the Los Angeles Judicial District. On January 4, 1973, pursuant to an application by the Davis

County Attorney, the Governor of Utah granted an extradition requisition. The Governor of California issued an extradition warrant on January 17, 1973. After a full hearing by California's Extradition Officer, appellant was ordered extradited. Appellant then attempted to obtain habeas corpus relief from the California courts and by certiorari before the United States Supreme Court. His petitions were denied.

The present habeas corpus petition was filed on April 13, 1973. On October 29, 1973, a status hearing was held where appellant's counsel indicated that the identity of her client was the only disputed factual matter since the requisitioning documents from Utah asked for "Brian Michael Price" instead of Mark Brian Price." Since Utah had previously attempted to prosecute appellant under his correct name, counsel argued that the incorrect name could be an attempt to camouflage the previous prosecution. This issue has been abandoned on appeal.

Following review of the documents submitted in support of the contentions of the parties the district court denied appellant's petition and also his motion for reconsideration. He appeals.

Appellant's major contentions on appeal are that double jeopardy and the absence of a speedy trial can be raised to defeat extradition in a habeas corpus proceeding before a federal court sitting in the asylum state. We disagree.

A court in the asylum state - be it state or federal - conducts a very

limited inquiry on applications for habeas corpus in extradition proceedings. United States ex rel. Tucker v. Donovan, 321 F.2d 114, 116 (2d Cir. 1963, cert. denied sub nom. Tucker v. Kross, 375 U.S. 977 (1964. Specifically,

> "(t)he courts of the asylum state are limited to deciding whether (1) a crime has been charged in the demanding state; (2) the fugitive in custody is the person so charged; and (3) the fugitive was in the demanding state at the time the alleged crime was committed." Woods v. Cronvich, 396 F.2d 142, 143 (5th Cir. 1968).

Appellant seems to concede that the inquiry is so limited; however, he contends that he is not a "fugitive from justice," both because Utah is barred from charging him with a crime under the double jeopardy clause and because Utah has denied him a speedy trial.

First, as to double jeopardy, appellant argues that because relatively recent cases, such as Benton v. Maryland, 395 U.S. 784, 794 (1969), and Fain v. Duff, 488 F.2d 218, 221-24 (5th Cir. 1973), cert. denied, 421 U.S. 999 (1975), have applied the double jeopardy clause to the states through the Fourteenth Amendment and have considered the double jeopardy issue in federal habeas corpus proceedings instituted by persons incarcerated under state law, the double jeopardy clause should be added as a new dimension to the concept of "fugitive

from justice."

Although imaginative, appellant's theory must fail. All previous attempts to raise the Bill of Rights in habeas corpus proceedings before federal courts sitting in the asylum state have been unsuccessful. See Sweeney v. Woodall, 344 U.S. 86 (1952) (Eighth Amendment); Watson v. Montgomery, 431 F.2d 1083 (5th Cir. 1970) (Sixth Amendment); Woods v. Cronvich, supra (Fourth Amendment); and Johnson v. Matthews, 182 F.2d 677 (D.C. Cir.), cert. denied, 340 U.S. 828 (1950) (Sixth Amendment and the Bill of Rights generally) In each instance, the underlying reason for refusing to hear petitioner's constitutional claim has been the need to preserve the scheme of interstate rendition set forth in both the Constitution and the tatutes that Congress has enacted to implement the Constitution, which scheme "contemplates the prompt return of a fugitive from justice as soon as the state which he fled demands him." Sweeney v. Woodall, supra, at 90. As the Fifth Circuit observed in Woods v. Cronvich, supra, at 143:

> "It is fundamental to our federal system that neither the courts of the asylum state, nor federal courts sitting in that state, seek to determine the constitutionality of prosecution in the state from which a fugitive has fled. It is for the courts of the charging state in the first instance to adjudicate the merits of appellant's claim."

Appellant offers no reason or authority for treating double jeopardy differently than any other provision of the Bill of Rights for purposes of extradition, and we can think of none. Therefore, we hold that the district court did not err in refusing to consider appellant's double jeopardy contention.

Appellant's speedy trial claim also must fail for the same reason. Johnson v. Matthews, supra, examined the same speedy trial contention that appellant advances here. In Johnson v. Matthews the District of Columbia Circuit expressly ruled that a federal court sitting in the asylum state could not consider petitioner's claim that his Sixth Amendment right to a speedy trial had been violated. Id. at 680. We agree with the reasoning of the District of Columbia Circuit in Johnson v. Matthews, and therefore hold in the instant case that the trial court did not err in refusing to consider appellant's contention that his right to a speedy trial has been violated.

Appellant also contends on appeal that he was denied due process when the district court required that his response to appellee's return be filed on November 14, 1973, at 5 p.m. - only five hours after appellee's return was filed. Appellee seeks to rebut appellant's contention by pointing out that appellant actually had until November 21, 1973, or a full seven days from the date that appellee filed his return, to file all documents in support of his petition. Appellee further notes that appellant, in fact, filed supplemental points and

authorities in support of his petition on November 16, 1973, or two days after the November 14 deadline.

In ruling on appellant's contention, we observe at the outset that appellant's attorney, having already litigated this case through the California courts, was thoroughly familiar with the facts and issues underlying appellant's petition for habeas corpus. Further, we note that counsel managed a lengthy and thorough response to appellee's return, and, in addition, filed supplemental points and authorities subsequent to the November 14 deadline. In short, we are not persuaded that appellant was prejudiced by the schedule established by the district court for filing memoranda. Therefore, we hold that appellant was not denied due process by the procedure used in the court below.

Appellant next contends that the district court erred in relying solely on the Governor of California's determination that appellant is a fugitive from justice. Appellant's argument is based on a misstatement of the facts. The district court explicitly declared that it based its order denying appellant's motion for rehearing not only on the determination made by the Governor of California, but also on the court's own findings of fact. Therefore, we find that appellant's argument is based on an incorrect statement of fact and is meritless.

Finally, appellant contended at oral argument that under the standard of Roberts v. Reilly, 116 U.S. 80, (1885)

the documentation presented to the Governor of California was deficient. We note at the outset that this assignment of error was neither raised in the court below, included in appellant's designation of points on appeal, nor discussed in appellant's or appellee's briefs. We find good reason for appellant's apparent lack of enthusiasm in raising this contention. The contention is frivolous. An examination of the Clerk's transcript shows the existence of the necessary authentication by Utah's Governor of essential exhibits, including Utah's complaint against appellant. Contrary to appellant's assertion, the standard set forth in Roberts v. Reilly, supra, is met in this case.

The order of the district court denying appellant's petition for writ of habeas corpus is affirmed.

APPENDIX "G"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK BRIAN PRICE, Petitioner-Appellant, vs. PETER J. PITCHESS, SHERIFF OF LOS ANGELES COUNTY, STATE OF CALIFORNIA, Respondent-Appellee.	)	NO. 74-2940 OPINION

(Revised July 7, 1977)

Appeal from the United States District Court for the Central District of California.

Before: ELY and TRASK, Circuit Judges, and EAST,* District Judge.

TRASK, Circuit Judge.

This is an appeal from the district court's denial of appellant's petition for a writ of habeas corpus and from the court's denial of appellant motion for reconsideration.

On November 19, 1969, appellant allegedly sold an hallucinogenic drug, LSD, to a Utah undercover officer. Based on this information and information obtained

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

from a confidential informant, police officers obtained a warrant to search appellant's residence. Evidence seized during the search furnished the basis for a complaint charging appellant with possession of narcotics for sale.

On January 15, 1970, before the City Court of Layton, Davis County, Utah, appellant successfully moved to suppress the evidence seized in the search of his residence. The court dismissed the case on the County Attorney's motion, there being no evidence against appellant other than that which was suppressed. Appellant apparently left Utah that same day.

On January 26, 1970, the complaint presently challenged, charging appellant with unlawful sale of hallucinogenic drugs on November 19, 1969, was issued, and an arrest warrant was obtained. Utah authorities contacted the FBI on March 18, 1970, and requested their assistance in locating appellant. On March 31, it was learned that appellant was probably in the Los Angeles area. Appellant was arrested on April 30, 1972, by an FBI agent in Burbank, California. At the time of his arrest appellant produced a Hawaii driver's license and a social security card bearing the name "Taylor Evan Craig." He stated that he was using that name and that the Hawaiian address on his license was his last permanent residence.

On December 12, 1972, Utah authorities filed a fugitive complaint in the Municipal Court of the Los Angeles Judicial District. On January 4, 1973, pursuant to an application by the Davis

County Attorney, the Governor of Utah granted an extradition requisition. The Governor of California issued an extradition warrant on January 17, 1973. After a full hearing by California's Extradition Officer, appellant was ordered extradited. Appellant then attempted to obtain habeas corpus relief from the California courts and by certiorari before the United States Supreme Court. His petitions were denied.

The present habeas corpus petition was filed on April 13, 1973. On October 29, 1973, a status hearing was held where appellant's counsel indicated that the identity of her client was the only disputed factual matter since the requisitioning documents from Utah asked for "Brian Michael Price" instead of Mark Brian Price." Since Utah had previously attempted to prosecute appellant under his correct name, counsel argued that the incorrect name could be an attempt to camouflage the previous prosecution. This issue has been abandoned on appeal.

Following review of the documents submitted in support of the contentions of the parties the district court denied appellant's petition and also his motion for reconsideration. He appeals.

Appellant's major contentions on appeal are that double jeopardy and the absence of a speedy trial can be raised to defeat extradition in a habeas corpus proceeding before a federal court sitting in the asylum state. We disagree.

A court in the asylum state - be it state or federal - conducts a very

limited inquiry on applications for habeas corpus in extradition proceedings. United States ex rel. Tucker v. Donovan, 321 F.2d 114, 116 (2d Cir. 1963), cert. denied sub nom. Tucker v. Kross, 375 US 977, 84 S. Ct. 496, 11 L.Ed.2d 421 (1964). Specifically,

> "(t)he courts of the asylum state are limited to deciding whether (1) a crime has been charged in the demanding state; (2) the fugitive in custody is the person so charged; and (3) the fugitive was in the demanding state at the time the alleged crime was committed." Woods v. Cronvich, 396 F.2d 142, 143 (5th Cir. 1968).

Appellant seems to concede that the inquiry is so limited; however, he contends that he is not a "fugitive from justice," both because Utah is barred from charging him with a crime under the double jeopardy clause and because Utah has denied him a speedy trial.

First, as to double jeopardy, appellant argues that because relatively recent cases such as Benton v. Maryland, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L. Ed.2d 707 (1969), and Fain v. Duff, 488 F.2d 218, 221-24 (5th Cir. 1973), cert. denied, 421 U.S. 999, 95 S.Ct. 2396, 44 L.Ed.2d 666 (1975), have applied the double jeopardy clause to the states through the Fourteenth Amendment, and ~~he~~ have considered the double jeopardy issue in federal habeas corpus proceedings instituted by persons incarcerated under state law, the double jeopardy clause clause should be added as a new dimension to the concept of "fugitive

from justice."

Although imaginative, appellant's theory must fail. All previous attempts to raise the Bill of Rights in habeas corpus proceedings before federal courts sitting in the asylum state have been unsuccessful. See Sweeney v. Woodall, 344 U.S. 86, 73 S.Ct. 139, 97 L.Ed. 114 (1952) (Eighth Amendment); Watson v. Montgomery, 431 F.2d 1083 (5th Cir. 1970)(Sixth Amendment); Woods v. Cronvich, supra (Fourth Amendment); and Johnson v. Matthews, 86 U.S.App.D.C. 376, 182 F.2d 677, cert. denied, 340 U.S. 828, 71 S.Ct. 65, 95 L.Ed. 608 (1950) (Sixth Amendment and the Bill of Rights generally.) In each instance, the underlying reason for refusing to hear petitioner's constitutional claim has been the need to preserve the scheme of interstate rendition set forth in both the Constitution and the Statutes that Congress has enacted to implement the Constitution, which scheme "contemplates the prompt return of a fugitive from justice as soon as the state which he fled demands him." Sweeney v. Woodall, supra, 344 U.S. at 90, 73 S.Ct. at 141. As the Fifth Circuit observed in Woods v. Cronvich, supra, at 143:

> "It is fundamental to our federal system that neither the courts of the asylum state, nor federal courts sitting in that state, seek to determine the constitutionality of prosecution in the state from which a fugitive has fled. It is for the courts of the charging state in the first instance to adjudicate the merits of appellant's claim."

Appellant offers no reason or authority for treating double jeopardy differently than any other provision of the Bill of Rights for purposes of extradition, and we can think of none. Therefore, we hold that the district court did not err in refusing to consider appellant's double jeopardy contention.

Appellant's speedy trial claim also must fail for the same reason. Johnson v. Matthews, supra, examined the same speedy trial contention that appellant advances here. In Johnson v. Matthews the District of Columbia Circuit expressly ruled that a federal court sitting in the asylum state could not consider petitioner's claim that his Sixth Amendment right to a speedy trial had been violated. Id. at 680. We agree with the reasoning of the District of Columbia Circuit in Johnson v. Matthews, and therefore hold in the instant case that the trial court did not err in refusing to consider appellant's contention that his right to a speedy trial has been violated.

Appellant also contends on appeal that he was denied due process when the district court required that his response to appellee's return be filed on November 14, 1973, at 5 p.m. - only five hours after appellee's return was filed. Appellee seeks to rebut appellant's contention by pointing out that appellant actually had until November 21, 1973, or a full seven days from the date that appellee filed his return, to file all documents in support of his petition. Appellee further notes that appellant, in fact, filed supplemental points and

authorities in support of his petition on November 16, 1973, or two days after the November 14 deadline.

In ruling on appellant's contention, we observe at the outset that appellant's attorney, having already litigated this case through the California courts, was thoroughly familiar with the facts and issues underlying appellant's petition for habeas corpus. Further, we note that counsel managed a lengthy and thorough response to appellee's return, and, in addition, filed supplemental points and authorities subsequent to the November 14 deadline. In short, we are not persuaded that appellant was prejudiced by the schedule established by the district court for filing memoranda. Therefore, we hold that appellant was not denied due process by the procedure used in the court below.

Appellant next contends that the district court erred in relying solely on the Governor of California's determination that appellant is a fugitive from justice. Appellant's argument is based on a misstatement of the facts. The district court explicitly declared that it based its order denying appellant's motion for rehearing not only on the determination made by the Governor of California, but also on the court's own findings of fact. Therefore, we find that appellant's argument is based on an incorrect statement of fact and is meritless.

Finally, appellant contended at oral argument that under the standard of Roberts v. Reilly, 116 U.S. 80, 6 S.Ct.

291, 29 L.Ed. 544 (1885), the documentation presented to the Governor of California was deficient. We note at the outset that this assignment of error was neither raised in the court below, included in appellant's designation of points on appeal, nor discussed in appellant's or appellee's briefs. We find good reason for appellant's apparent lack of enthusiasm in raising this contention. The contention is frivolous. An examination of the Clerk's transcript shows the existence of the necessary authentication by Utah's Governor of essential exhibits, including Utah's complaint against appellant. Contrary to appellant's assertion, the standard set forth in Roberts v. Reilly, supra, at 95, 6 S.Ct. 291, is met in this case.

The order of the district court denying appellant's petition for writ of habeas corpus is affirmed.

APPENDIX "H"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK BRIAN PRICE,	)	
	)	
Petitioner-Appellant,	)	NO. 74-2940
	)	
vs.	)	O R D E R
	)	
PETER J. PITCHESS, SHERIFF OF LOS ANGELES COUNTY, STATE OF CALIFORNIA,	)	
	)	
Respondent-Appellee.	)	

Before: ELY and TRASK, Circuit Judges, and EAST, *District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing.

The petition for rehearing is denied.

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss

Ethel Vornholt, being first duly sworn, deposes and says: I am a citizen of the United States a employed in the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 617 S. Olive St., Suite 510, Los Angeles, California 90014

On August 4, 1977 I served the within Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Ninth Circuit on the interested parties in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully preapd, in the United States mail at Los Angeles, California, addressed as follows:

Attorney General of California
3580 Wilshire Blvd., Los Angeles,
California 90010

Ethel Vornholt
Affiant

Subscribed and sworn to before me this 4th day of August, 1977.

(SEAL)

Jacquelyn Brucker
Notary Public in and for Said
County and State

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-201

MARK BRIAN PRICE,

Petitioner,

v.

PETER J. PITCHESS, SHERIFF OF LOS ANGELES COUNTY, STATE OF CALIFORNIA,

Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

BRIEF OF REAL PARTY IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN K. VAN DE KAMP
District Attorney of
Los Angeles County

Member of the Bar of
the Supreme Court of
the United States

849 South Broadway, 11th Floor
Los Angeles, CA 90014
Telephone: (213) 974-5921

Attorney for Real Party in Interest

Of Counsel:
HARRY B. SONDHEIM
Head, Appellate Division

RODERICK W. LEONARD
Deputy District Attorney

Member of the Bar of the Supreme Court of the United States

DIRK L. HUDSON
Deputy District Attorney

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

IN THE
SUPREME COURT OF THE UNITED STATES
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MARK BRIAN PRICE,

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v.

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Respondent,

PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

BRIEF OF REAL PARTY IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

OPINIONS BELOW

The petition accurately sets forth the opinions below.

II

JURISDICTION

The petition adequately sets forth

the alleged jurisdiction[1] of this Court to entertain the present petition.

III

ISSUES PRESENTED

A. WHETHER THE CONSTITUTION REQUIRES PROMPT INTERSTATE RENDITION OF FUGITIVES

B. WHETHER CONSTITUTIONAL DEFENSES TO THE CHARGE MUST BE ASSERTED IN THE DEMANDING STATE

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1. Although "final" in the sense of "an effective determination of the litigation" (Market St. Ry. Co. v. Railroad Commission [1945] 324 U.S. 548, 551; 89 L.Ed. 1171, 1176; 65 S.Ct. 770, 773) if the California extradition proceeding is taken as "the litigation", the decision of the Ninth Circuit is not "final" in the sense of an effective determination of the Utah criminal proceeding which has not proceeded past the January 26, 1970 complaint.

Should Utah criminal proceedings ever commence (whether by means of extradition or petitioner's fortuitous return to that state) this Court's resolution of petitioner's double jeopardy, collateral estoppel, and speedy trial contention would apparently bind the Utah court's resolution of those issues so as to either conclude the criminal proceedings or permit their continuation.

C. WHETHER APPELLANT'S CONTENTIONS ARE OUTSIDE THE NARROW SCOPE OF EXTRADITION HABEAS CORPUS

D. WHETHER THE PLEA OF DOUBLE JEOPARDY, LIKE ANY PLEA, MUST BE ENTERED IN THE DEMANDING STATE AND CANNOT BE CONSIDERED PRIOR THERETO IN THE ASYLUM STATE AS A DEFENSE TO EXTRADITION

E. WHETHER STATE REMEDIES HAVE BEEN EXHAUSTED

F. WHETHER, ASSUMING APPLICABILITY OF PROSPECTIVE DOUBLE JEOPARDY IN THE DEMANDING STATE TO EXTRADITION HABEAS CORPUS, SUCH JEOPARDY CAN BE FOUNDED ON THE ALLEGED COLLATERAL ESTOPPEL EFFECTS OF A PRETRIAL DISMISSAL BASED ON EVIDENCE SUPPRESSION OF A DIFFERENT CHARGE BASED ON A DIFFERENT OFFENSE NOT EVEN OCCURRING ON THE SAME DAY

G. WHETHER ALLEGED DENIAL OF SPEEDY TRIAL IS REVIEWABLE IN THE ASYLUM STATE ON EXTRADITION HABEAS CORPUS

H. WHETHER PETITIONER WAS ENTITLED TO A FULL EVIDENTIARY HEARING, HAVING PLACED NO DISPUTED FACTS IN ISSUE RELEVANT TO THE QUESTION OF EXTRADITION

IV

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2, of the United States Constitution provides in pertinent part as follows:

* * *

"2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

V

STATEMENT OF THE CASE[2/]

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2. Key to Abbreviations:

C.R. refers to Clerk's Record
R.T. refers to Reporter's Transcript
Petition refers to petition for certiorari
A. refers to appendix of petition for certiorari

On November 19, 1969 petitioner allegedly sold L.S.D. to undercover police officer Van Zile in Woods Cross City, Utah. (C.R. 23, 24.) Instead of charging this offense, authorities used the information to obtain a warrant to search petitioner's residence (C.R. 100-106, 80-86) (thereby avoiding disclosure of Van Zile's identity). Evidence seized November 24, 1969 formed the basis for a complaint issued that day charging petitioner with possession of narcotics for sale. (C.R. 56, 79.) However, at the January 15, 1970 preliminary hearing, all the evidence was suppressed (C.R. 55) on petitioner's motion (C.R. 60-62), resulting in dismissal of the complaint on prosecution motion (C.R. 55).

On January 26, 1970 the present complaint (embodying the affidavit of Ron Ballantyne) and arrest warrant was issued charging petitioner with the November 19, 1969 unlawful sale of L.S.D. (C.R. 24, 72, 21), a decision having apparently been made to use the testimony of Van Zile whose identity had previously been confidential (C.R. 23, 35).

Sometime after the January 15, 1970 hearing, petitioner left Utah. (C.R. 23,

55.) Utah authorities contacted the FBI on March 18, 1970 and requested their assistance in locating appellant. On March 31, it was learned that appellant was probably in the Los Angeles area. Appellant was arrested on November 30, 1972,[3] by an FBI agent in Burbank, California. At the time of his arrest appellant produced a Hawaii driver's license and a social security card bearing the name "Taylor Evan Craig." He stated that he was using that name and that the Hawaiian address on his license was

3. Although FBI Agent Farrell's original affidavit specified April 30, 1972 as the date Price was finally located and apprehended (C.R. 34), this was found to be an inadvertent error. Agent Farrell subsequently executed a correcting affidavit which was submitted to the Court of Appeals for the Ninth Circuit with a stipulation of counsel for petitioner and real party in interest that it be added to the record. This latter document gives November 30, 1972 as the date of apprehension. (See "Order Augmenting and Correcting Record" in Ninth Circuit.)

his last permanent residence. (C.R. 34-35.)[4]

On December 12, 1972 authorities filed a fugitive complaint in the Municipal Court of the Los Angeles Judicial District (C.R. 73). On January 4, 1973, pursuant to an application by the Davis County Attorney (C.R. 20-23), the Governor of Utah granted an extradition requisition. (C.R. 19.) The Governor of California issued an extradition warrant on January 17, 1973. (C.R. 31-32.) After a full hearing by California's Extradition Officer, appellant was ordered extradited. (C.R. 37.) Appellant then attempted to obtain habeas corpus relief from the California courts (petition, A1-2) and by certiorari before the United States

4. Price also stated (spontaneously):

"Those redneck, cowboy, Mormans had me dead to rights. They had evidence three feet high with pictures of LSD and fingerprints, but they really blew it. Their affidavit for a search warrant didn't have enough probable cause so everything got suppressed. They were supposed to have a confidential informant but didn't want to reveal him. I guess now they are going to. They know I'm guilty but can't prove it." (C.R. 35: 21-28.)

Supreme Court (petition, 2). His petitions were denied. (C.R. 37-38, 41-42.) (Price v. California [1973] 414 U.S. 823, 38 L.Ed.2d 56, 94 S.Ct. 123.)

The present habeas corpus petition was filed on April 13, 1973. (C.R. 1-9.) On October 29, 1973, a status hearing was held where appellant's counsel indicated that the identity of her client was the only disputed factual matter since the requisitioning documents from Utah asked for "Brian Michael Price" instead of "Mark Brian Price." Since Utah had previously attempted to prosecute appellant under his correct name, counsel argued that the incorrect name could be an attempt to camouflage the previous prosecution. (R.T. 6-8.) This issue has been abandoned on appeal.

Following review of the documents submitted in support of the contentions of the parties the district court denied appellant's petition and also his motion for reconsideration (petition, A2-10). He appealed.

On May 16, 1977 the United States Court of Appeals for the Ninth Circuit affirmed (petition, A11-18), issuing a revised opinion on July 7, 1977 (petition,

A19-26) and denying rehearing on July 11, 1977 (petition, A27).

Price now, for the second time, petitions this Court for certiorari.

VI

SUMMARY OF ARGUMENT

The instant petition fails to demonstrate that the Court of Appeals for the Ninth Circuit has, inter alia, "decided a federal question in a way in conflict with applicable decisions of this court." (Rule 19[b], Rules of the Supreme Court of the United States). In fact, the Ninth Circuit herein has rigorously followed this Court's decisions construing the extradition clause of the federal constitution (U.S. Constitution, Art 4, § 2, clause 2) so as to permit only a narrow scope of review in the asylum state, (Drew v. Thaw [1914] 235 U.S. 432, 440; 59 L.Ed. 302, 308; 35 S.Ct. 137, 139), thereby requiring petitioner to litigate his constitutional claims in the state and federal courts of the demanding state (Sweeny v. Woodall [1952] 344 U.S. 86, 89; 97 L.Ed. 114, 117-118; 73 S.Ct. 139, 140). This has been applied both to double jeopardy claims (In re Bloch, [W.D., Ark, 1898] 87 F. 981, 984; In re Collins, [1907] 151 Cal. 340, 350; Lucas v. Sheriff of

Lyon County [Nev. Supreme Court, 1970] 466 P.2d 659, 660; People ex rel Coine v. Reilly [1930] 240 N.Y.S. 27, 28-29, cf. Whitten v. Tomlinson [1895] 16 U.S. 231, 243; 40 L.Ed. 406, 412), and speedy trial claims (People v. Hoy [1961] 223 N.Y.S.2d 759, 761; Roberts v. Hocker [Nev., 1969] 456 P.2d 425, 428; Commonwealth v. Johnson [Penn., 1972] 292 A.2d 456).

Finally, this is the second petition for certiorari herein. The first came after the exhaustion of asylum-state state remedies. (See Price v. California [1973] 414 U.S. 823, 38 L.Ed.2d 56, 94 S.Ct. 123.) The only new development is the exhaustion of asylum-state federal remedies. Yet petitioner raises no issues peculiar to federal review. It follows that the certiorari should again be rejected for the same reasons it was initially rejected as the law of the case.

VII

ARGUMENT

A

THE CONSTITUTION REQUIRES PROMPT INTERSTATE RENDITION OF FUGITIVES

Lyon County [Nev. Supreme Court, 1970] 466 P.2d 659, 660; People ex rel Coine v. Reilly [1930] 240 N.Y.S. 27, 28-29, cf. Whitten v. Tomlinson [1895] 16 U.S. 231, 243; 40 L.Ed. 406, 412), and speedy trial claims (People v. Hoy [1961] 223 N.Y.S.2d 759, 761; Roberts v. Hocker [Nev., 1969] 456 P.2d 425, 428; Commonwealth v. Johnson [Penn., 1972] 292 A.2d 456).

Finally, this is the second petition for certiorari herein. The first came after the exhaustion of asylum-state state remedies. (See Price v. California [1973] 414 U.S. 823, 38 L.Ed.2d 56, 94 S.Ct. 123.) The only new development is the exhaustion of asylum-state federal remedies. Yet petitioner raises no issues peculiar to federal review. It follows that the certiorari should again be rejected for the same reasons it was initially rejected as the law of the case.

VII

ARGUMENT

A

THE CONSTITUTION REQUIRES PROMPT INTERSTATE RENDITION OF FUGITIVES

test the claimed unconstitutionality of his treatment by Alabama in the courts of that State. Respondent should be required to initiate his suit in the courts of Alabama, where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned." (Footnotes omitted.)[5]

B

CONSTITUTIONAL DEFENSES TO THE CHARGE MUST BE ASSERTED IN THE DEMANDING STATE

Petitioner's contention that

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5. Petitioner cites "[t]he right to remove from one place to another" which he predicates on Article 4, section 2, subsection 1, of the U.S. Constitution, as a right of national citizenship protected against state action by the privileges and immunities clause of the Fourteenth Amendment (petition, p. 15). However, subsection 2 of Article 4, section 2 contains the extradition clause, obviously a limitation on the preceding subsection. Accordingly, petitioner concedes "[t]he limitation on the right of free movement [which] applies only when a citizen is a fugitive from the law " (petition, p. 16, first full paragraph).

constitutional defenses to the charge can be raised upon extradition habeas corpus is definitively answered in Johnson v. Matthews (D.C. Cir., 1950) 182 F.2d 677, 680, wherein the court after an analytical review of the history and purposes of the extradition clause to the federal constitution (Article IV, Section 2, Clause 2) was impelled to conclude:

"Of course, appellant has a right to test in a federal court the constitutional validity of his treatment by Georgia authorities. But that test cannot come as a part of the constitutional process of returning a fugitive to the state where he is charged. If this fugitive's constitutional rights are being violated in Georgia, he can and should protect them in Georgia. Not only state courts but a complete system of federal courts are there."

Thus the availability of federal relief in Utah under Fain v. Duff, (5th Cir., 1973) 488 F.2d 218 is all the more reason to reject petitioner's claim that his constitutional defenses

to the charge must be reviewed in the asylum state contrary to the constitutional mandate of the extradition clause.

As stated in Woods v. Cronvich, (5th Cir., 1968) 396 F.2d 142, 143:

"It is fundamental to our federal system that neither the courts of the asylum state, nor federal courts sitting in that state, seek to determine the constitutionality of prosecution in the state from which a fugitive has fled. It is for the courts of the charging state in the first instance to adjudicate the merits of appellant's claim. Should the appellant be denied relief in the courts of Ohio, he is entitled to raise his constitutional question in the federal courts of Ohio."

The mere fact that a different section of the federal bill of rights was involved in Woods than in the matter at bar would not seem to affect the above rationale. Nor is there any distinction here as to fugitivity as we point out elsewhere in this brief.

C

APPELLANT'S CONTENTIONS ARE OUTSIDE THE NARROW SCOPE OF EXTRADITION HABEAS CORPUS

The language of the extradition clause of the Constitution (Art. 4, § 2, cl. 2) and statutory authority thereunder (28 USC §2241(c)(3)) results in a narrow scope for extradition habeas corpus proceedings, encompassing four issues: (1) "the identity of the person," (2) "the fact that he is a fugitive from justice," (3) "the demand in due form," (4) "the indictment [i.e. criminal accusation] ... for what ... [is alleged] ... to be a crime in ... [the demanding] state, and the reasonable possibility that it may be such." (Drew v. Thaw [1914] 235 U.S. 432, 440; 59 L.Ed. 302, 308). Where these all appear, "the constitutionally required surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place." (Id., 235

U.S. at 440.)

1. Fugitivity

Fugitivity is indeed a relevant issue to litigate in the asylum state (Drew v. Thaw [1914] 235 U.S. 432, 59 L.Ed. 302, 35 S.Ct. 137). However, a "fugitive" is simply an accused who, having been in the demanding state when the alleged crime was committed, thereafter left that state and was found within the territory of another (any more extensive inquiry frustrating the purpose of the extradition clause) (Appleyard v. Massachusetts [1906] 203 U.S. 222, 227; 51 L.Ed. 161, 163, 27 S.Ct. 122, 123-4); Moncrief v. Anderson, [D.C. Cir., 1964] 342 F.2d 902, 904; Hogan v. O'Neill [1920] 255 U.S. 52, 56, 65 L.Ed. 500). This is a question of fact to be determined in the first instance by the Governor of the asylum state. (Moncrief, supra at 904) and release on habeas corpus is improper "unless it is made clearly and satisfactorily to appear that petitioner is not a fugitive from justice within the meaning of the Constitution and laws of the United

States" (Illinois ex rel McNichols v. Pease [1907] 207 U.S. 100, 112, 52 L.Ed. 121, 126)

Petitioner has not alleged any facts coming within the above definition of fugitivity[6/] or any of the other issues reviewable on extradition habeas corpus (See Drew, supra, 235 U.S. at 440, 59 L.Ed. at 308.)

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6. Petitioner appears to claim that he left Utah before any further charges could be filed "believing that the matter had been dismissed and finally disposed of" (petition, p. 5, third full paragraph; see also p. 6, first full paragraph [note word "immediately"]), a fact known only to him. However, since a "fugitive from justice" is not necessarily one who left the state for the very purpose of avoiding prosecution or one who left the state believing he had violated criminal laws (Black's Law Dictionary, 4th ed., p. 800 ["fugitive from justice"], citing, inter alia Hogan, supra, and Ex parte Morris [1936], 101 SW 2d 259, 261-2), it follows that petitioner need not have left Utah after the filing of the present charge nor have believed that a further charge would be filed. Nevertheless, petitioner's comment after his capture shows he was at most merely unsure that authorities would decide to reveal the informant's identity so as to charge the

(footnote 6 contd. on p. 19)

2. Sufficiency of Charge

The sufficiency of the charge for extradition purposes does not require "that there should be a good indictment, or even an indictment of any kind. It requires nothing more than a charge of crime." (Pierce v. Creecy [1908] 210 U.S. 387, 403, 52 L.Ed. 1113, 1121; 28 S.Ct. 714, 719.) It is enough that it plainly charges "the substance of a crime against the laws of [the demanding state]" (Roberts v. Reilly [1885] 116 U.S. 80, 96; 29 L.Ed. 544, 549; 6 S. Ct. 291, 300) and that the facts alleged "do not seem to be impossible in law." (Roberts, supra, 116 U.S. 96, 29 L.Ed. 549, 6 S.Ct. 300.)

(Fn. 6 contd. from p. 18)

earlier crime (sale of L.S.D.) (C.R. 35, lines 21-28), which is, of course, a separate and distinct offense. His use of an alias and Hawaiian address (C.R. 35, lines 3-8) suggests that petitioner left Utah in order to avoid further prosecution.

Contrary to petitioner (petition, p. 6, second full paragraph) the January 26, 1970 complaint (charging sale of LSD on November 19, 1969) (C.R. 24, 72) did not charge "the same offense" as the November 24, 1969 complaint (possession for sale on November 24) (C.R. 56, 79).

"There must be objections which reach deeper into the indictment than those which would be good against it in the court where it is pending" (Pierce, supra, 210 U.S. at 401-402; 52 L.Ed. at 1120; 28 S.Ct. at 718); see also Collins v. Tragger [9th Cir. 1928] 27 F.2d 842).

Obviously none of petitioner's claimed defenses are relevant to the "sufficiency of the charge" in terms of this standard.7/

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7. Petitioner erroneously claims that "there was no affidavit until more than two years after the alleged transaction" (petition, p. 21, carryover paragraph) while simultaneously admitting that the January 26, 1970 "complaint was sworn to by Ron Ballantyne" (petition, p. 13, paragraph beginning that page). Black's Law Dictionary (4th ed., 1957) defines "affidavit" as, inter alia, "... [a] statement or declaration reduced to writing, and sworn to or affirmed before some officer who has authority to administer an oath or affirmation [citation omitted] ", indicating further that "... '[affidavits]' are of two kinds; those which serve as evidence to advise the court in the decision of some preliminary issue or determination of some substantial right, and those which merely serve to invoke the judicial power. [Citation omitted.]" Defining "complaint", Black's specifies that "... [it] is often used interchangeably with 'affidavit'. [Citation omitted.]" Thus, the January 26, 1970 sworn complaint herein also constituted the affidavit of Ron Ballantyne. (See C.R. 24, 72.)

D

THE PLEA OF DOUBLE JEOPARDY, LIKE ANY PLEA, MUST BE ENTERED IN THE DEMANDING STATE AND CANNOT BE CONSIDERED PRIOR THERETO IN THE ASYLUM STATE AS A DEFENSE TO EXTRADITION

The general rule as to admissibility of defenses to the charge on habeas corpus review in the asylum state is as follows: "On habeas corpus in extradition cases, the court will not try the question of guilt or innocense, or consider or pass on any matters of defense, even on the issue of accused's status as a fugitive from justice. Insanity of accused is matter of defense within this rule, as is the statute of limitations or a plea of former jeopardy, conviction, or acquittal, or an alibi, except where the evidence of alibi is such as to disprove that accused is a fugitive from justice." (39 C.J.S. 561-562 ["Habeas Corpus" § 39] [footnotes omitted].)

As the above quotation indicates, double jeopardy, although a defense to further prosecution on the charge in the demanding state, is not a defense to extradition from the asylum state. (As to

habeas corpus before entry of plea, see Whitten v. Tomlinson [1895] 160 U.S. 231, 243; 40 L.Ed. 406, 412; 16 S.Ct. 297, 302 [an extradition case]; as to extradition, see In re Bloch [W.D., Ark., 1898] 87 F. 981, 984; In re Collins [1907] 151 Cal. 340, 350; Lucas v. Sheriff of Lyon County [Nev. Supreme Court, 1970] 466 P.2d 659, 660; People ex rel. Coine v. Reilly [1930] 240 N.Y.S. 27, 28-29.) The rejection of the prisoner's contentions that double jeopardy was in issue was essential to the upholding of extradition in each case. This is even more the case, where as here, the plea of double jeopardy has not yet been entered in the demanding state. (See Whitten v. Tomlinson [1895] 16 U.S. 231, 243; 40 L. Ed. 406, 412; 16 S.Ct. 297, 302.)

"Once in jeopardy" is generally entered as a plea to the charge (e.g., California Penal Code § 1016). By analogy, alibi evidence in support of a plea of innocence or "not guilty" is inadmissible to show that the petitioner is not a fugitive from justice (unless it also tends to show absence from the demanding state at the time the crime was committed). (39 C.J.S. 557 ["Habeas Corpus" § 39];

Ryan v. Rogers [1913] 21 Wyo. 311, 132 P. 95, 104-106.) Early as a plea may arise in the course of criminal proceeding, it is by no means the earliest stage. Between the filing of the charge and entry of the plea, a defendant may demur to the accusatory pleading on grounds of the statute of limitations, also a bar (People v. Ayhens [1890] 85 Cal. 86, 89). Nevertheless, the statute of limitations is not a defense to extradition (U.S. ex rel Tyler v. Henderson [1971] 453 F.2d 790, 793). Even the more fundamental defect that the statute defining the crime is unconstitutional is not a defense to extradition (Pearce v. Texas [1894] 155 U.S. 311, 39 L.Ed. 164, 15 S.Ct. 116; Collins v. Traeger [9th Cir. 1928] 27 F.2d 842; People ex rel Gilbert v. Babb [1953] 415 Ill. 349, 354-357, 114 N.E.2d 358, 361-363.) All of these defenses arise after and in response to the filing of the charge. However, "[e]xtradition is an even more preliminary step in a criminal proceeding than the filing of an indictment." (In re Russell [1974] 12 Cal.3d 229, 233.)

E

STATE REMEDIES HAVE NOT BEEN EXHAUSTED HEREIN--A PREREQUISITE TO FEDERAL HABEAS CORPUS

1. Must Include Remedies of Demanding State

Where an applicant for a writ of habeas corpus in behalf of a fugitive from custody pursuant to a judgment in another state seeks federal relief on grounds of prospective or actual denial of constitutional right in the demanding state, not only must the remedies of the asylum state be exhausted, but also those of the demanding state. (Sweeney v. Woodall [1952] 344 U.S. 86, 89-90; 97 L. Ed. 114, 118; 73 S.Ct. 139, 140-141.) A fortiori, this requirement would apply even more strongly herein where the demanding state has not yet been afforded an opportunity to even provide the applicant with pre-trial remedies, much less the fair trial which presumably awaits. (Cf. Malory v. McGettrick [6th Cir. 1963] 318 F.2d 816, 817.) The grounds for relief recited in the instant petition should have been addressed to the courts of Utah whose remedies have not been even sampled, much less exhausted.

Petitioner correctly states that he is entitled to be heard in the asylum state as to his fugitivity (citing, Drew v. Thaw, 235 U.S. 432, and other decisions). By definition, remedies as to fugitivity (as opposed to criminality and triability) could only be found within an asylum state (and could only be exhausted there). Nevertheless, as we show elsewhere in this brief (supra at 17), claims of double jeopardy and other constitutional defenses to the charge do not relate to fugitivity as authoritatively defined,[8] but extend beyond the narrow concerns of the asylum state as such. It follows that remedies which by their nature can be sought in the demanding state should first be sought there (even though, as to these issues, it leaves appellant at the mercy of the state and federal courts of Utah). It should be noted that the District Court applied the Sweeney requirement only to appellant's claims of prospective denial of constitutional rights in the demanding state. (C.R. 132.)

Petitioner herein wants more than review by state and federal court systems in

8. Nor do they relate to any other extradition issue. (See infra.)

the demanding state. He also insists on litigating these non-extradition issues in two additional series of courts (i.e., state and federal of the asylum state). If such eternal litigation is not to assume Dickensian proportions, appellant must be promptly returned to Utah to litigate his non-extradition issues.

2. Must Include Remedies Other Than Habeas Corpus

Even had petitioner exhausted his habeas corpus remedies in both Utah and California (not the case herein), if other state remedies remain which he could assert, his state remedies have not been exhausted. (Tyler v. Swenson [1973] 483 F.2d 611, 614.) Herein, petitioner has concededly failed to enter in Utah courts a plea of once-in-jeopardy or his motion to dismiss for lack of speedy trial under the Sixth and Fourteenth Amendments to the Federal Constitution. Failure to do so is fatal to his application for federal habeas corpus.

F

EVEN ASSUMING APPLICABILITY OF PROSPECTIVE DOUBLE JEOPARDY IN THE DEMANDING STATE TO EXTRADITION HABEAS CORPUS, SUCH JEOPARDY CANNOT BE FOUNDED ON THE ALLEGED COLLATERAL ESTOPPEL EFFECTS OF A PRETRIAL DISMISSAL BASED ON EVIDENCE SUPPRESSION OF A DIFFERENT CHARGE BASED ON A DIFFERENT OFFENSE NOT EVEN OCCURRING ON THE SAME DAY

Former Jeopardy

Under the facts alleged by appellant jeopardy never attached because the matter was dismissed before the trial stage had been reached, no jury having been duly empanelled, sworn and charged with the case, and no witness having been called or sworn to testify at the trial as to the merits. (C.T. 55, 64.) (See People v. Young [1929] 100 Cal.App. 18, 23; Collins v. Loisel [1922] 262 U.S. 426, 67 L.Ed. 1062; State v. Dean [Utah, 1927] 254 P. 142, 144, 69 Utah 268; Boyer v. Larson [Utah, 1967] 43 P.2d 1015, 1016, 20 Utah 2d 121.)

This situation resulted because all evidence relating to the merits had been suppressed and the matter was dismissed before the trial stage was reached. (C.R. 35.) (See generally 22 C.J.S. 658 ["Criminal Law" § 251].)

In addition, whatever jeopardy might have accrued in the matter previously dismissed (C.R. 56, 79) would not be a bar to prosecution of the present offense (C.R. 23, 24, 72, 84, 164) which is neither the "same offense" (see, United States Constitution, Fifth Amendment) nor another offense based upon or included in the act previously charged, but a separate and distinct crime. (C.T. 77, 84.) (See People v. Brannon [1924] 70 Cal. App. 225, 235; Pereira v. United States [1953] 347 U.S. 1, 11; 98 L.Ed. 435, 445; 74 S.Ct. 358, 364; United States v. Ewell, Ind. [1966] 383 U.S. 116, 124-125; 15 L.Ed.2d 627, 633; 86 S.Ct. 773, 778-779; see generally 22 C.J.S. 719 ["Criminal Law" § 278(1)], 22 C.J.S. 722 ["Criminal Law" § 279].)

Res Judicata and Collateral Estoppel

Under the facts alleged by appellant neither the doctrines of res

judicata or collateral estoppel apply because there was no final determination on the merits but merely a pretrial dismissal based on evidence suppression. (See People v. Van Eyk [1961] 56 Cal.2d 471, 477; People v. Dugan [1964] 230 Cal.App.2d 254, 256; see generally 50 C.J.S. 53 ["Judgments" § 627] 50 C.J.S. 73 ["Judgments" § 639]; Gardner v. United States [9th Cir.; Cal.; 1934] 71 F.2d 63, 64, cert. den. 293 U.S. 619, 79 L.Ed. 707; Orient Ins. Co. v. Ariasi [9th Cir., 1928] 28 F.2d 579, 581, cert. den. Ariasi v. Orient Ins. Co., 279 U.S. 837, 73 L.Ed. 984.)

Defenses Not Properly Raised

By failing to set up the special plea of once in jeopardy appellant waives his right to assert it (In re Harron [1923] 191 Cal. 457, 467; State v. Bohn [Utah, 1926] 248 P. 119, 121, 67 Utah 362; see generally 22 C.J.S. 711 ["Criminal Law" § 277].) Similarly, the defenses of res judicata and collateral estoppel should be raised by pleading as an affirmative defense or by proper and timely objection to the

introduction of the evidence (People v. Beltran [1949] 94 Cal.App.2d 197, 207 [defense considered, under circumstances, but manner presented disapproved]; see generally 50 C.J.S. ["Judgments" § 822].) All of this tends to show that consideration of these defenses on extradition habeas corpus before even a plea is entered or evidence is attempted to be introduced is necessarily premature and unripe.

G

ALLEGED DENIAL OF SPEEDY TRIAL
IS NOT REVIEWABLE IN THE
ASYLUM STATE ON EXTRADITION
HABEAS CORPUS

Like other defenses, the allegations that the demanding state has deprived petitioner of his constitutional and statutory rights to a speedy trial cannot be reviewed in a habeas corpus proceeding challenging the validity of the extradition process. (People v. Hoy [N.Y., 1961] 223 N.Y.S. 2d 759, 761; Roberts v. Hocker [Nev. 1969] 456 P.2d 425, 428; Commonwealth ex rel Johnson v. Johnson [Penn.,1972] 292 A. 2d 456). A state's right to the return of a fugitive is not waived, where, though having knowledge of the prisoner's whereabouts, such state has not without unreasonable delay initiated extradition proceedings (In re McBride [1953] 115 Cal. App.2d 538, 543; cf. Maryland v. Kurek [1964] 233 F. Supp. 431, 433 [pre-trial federal removal not compelled where state remedies not yet exhausted]).9/

9. Petitioner cites Moore v. Arizona [1973] 414 U.S. 25, 38 L.Ed.2d 183, 94 S. Ct. 188 (petition, 22). However, unlike

[fn. continued on p.]

Because of the imprecision of the right to a speedy trial, the length of the delay in bringing a defendant to trial that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of each case (Barker v. Wingo [1972] 407 U.S. 514, 530; 33 L.Ed.2d 101, 117; 92 A S.Ct. 2182, 2192). A balancing test must be employed wherein the conduct of both the prosecution and the defendant are weighed (id., 407 U.S. at 530, 33 L.Ed.2d at 116; 92A S.Ct. at 2191-2192). Factors include (1) length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) prejudice to the defendant (id., 407 U.S. at 530, 33 L.Ed.2d at 117). Different weights should be assigned to different reasons for delay of the case by the government (id., 407 U.S. at 531; 33 L.Ed.2d at 117; 92A S.Ct. at 2192-2193). Of course, if delay is attributable to the defendant, then his waiver may be

[fn. 9 continued]

the instant case, Moore did not involve an attempt to review the speedy trial issue on extradition habeas corpus in the state and federal courts of the asylum state.

given effect under standard waiver doctrine. (Id., 407 U.S. at 533, 33 L.Ed.2d at 116, 92A S.Ct. at 2191.)

Because of the difficulty of balancing these factors (Barker, supra, 407 U.S. at 533, 33 L.Ed.2d at 117, 92A S.Ct. at 2193) it makes sense that the only logical place for consideration of such a claim at the onset is the demanding state wherein most of the witnesses, evidence, and records relevant to the claim would be situated.

Using the Barker test, it appears that the greater part of the delay seems to be attributable to petitioner himself, hiding out in Hawaii under an assumed name with phony credentials. The steps undertaken locally by Utah authorities before contacting the FBI on March 18, 1970 and after learning of petitioner's November 30, 1972[10/] apprehension on federal charges should obviously be reviewed at the outset in the courts of the state of Utah who are best equipped to weigh the various factors.

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10. See footnote 3, supra.

H

PETITIONER WAS NOT ENTITLED TO A FULL EVIDENTIARY HEARING, HAVING PLACED NO DISPUTED FACTS IN ISSUE RELEVANT TO THE QUESTION OF EXTRADITION

Petitioner contends that he is "entitled to a full evidentiary hearing" in the asylum state "on the issue of probable cause to issue an extradition warrant based on the facts of this case." (Petition, 8, first full paragraph; 12, third full paragraph). Yet his petition apparently does not refer to any issue of fact that should have been thus explored.

Appellant admits that he was given an executive hearing on February 9, 1973 before the California Governor's Extradition Officer at which he was represented by his present counsel and wherein "all issues raised" in his original petition for habeas corpus, "including the issue of identity and whether the petitioner was and is a fugitive from justice were raised." (C.R. 37: 17-26.)

At the governor's hearing evidence independent of the requisition papers is not required (Marbles v. Creecy [1909] 215 U.S. 63, 67-68; 54 L.Ed. 92, 94; 30

S.Ct. 32, 33). Thus the function of a court, reviewing the governor's decision, is to determine whether, as a matter of law, it could have been reached on the basis of the evidence before him, not to weigh the evidence de novo (Ex Parte Reggel [1885] 114 U.S. 642, 653; 29 L.Ed. 250, 254; 5 S.Ct. 1148, 1154). If the jurisdictional facts authorizing the extradition of the accused appear from the papers, the mere "evidence pro and con" as to a question of fact before the governor would not justify discharge on habeas corpus. (Hyatt v. New York ex rel Corkran [1902] 188 U.S. 691, 710-711; 47 L.Ed. 657, 661; 23 S.Ct. 456, 458-459; Commonwealth ex rel Flower v. Superintendent of Phila. County Prison [Penn. 1908] 69 A. 916, 917; Moncrief v. Anderson [D.C. Cir., 1964] 342 F.2d 902, 904.) Thus, no evidentiary hearing is required where the allegations even if proven "would present only a conflict in the evidence" (Smith v. State of Idaho [9th Cir., 1967] 373 F.2d 149, 156).

In the district court, petitioner pointed out that the name on the fugitive complaint filed in Los Angeles Municipal Court on December 13, 1972, was "Brian Michael Price" (R.T. 5, lines 19-23; C.R.

73). Yet the Utah requisition (C.R. 19) and both Utah complaints (C.R. 24, 79) refer to Mark Brian Price (or Mark Price). Furthermore, petitioner also implicitly admitted identity in order to claim double jeopardy (R.T. 5, lines 24-25) and upon capture had volunteered that he was the person sought in both complaints (C.R. 35). The mistaken identity claim was abandoned on appeal (petition, A21, first full paragraph) and appears not to be presented by the instant petition.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

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By

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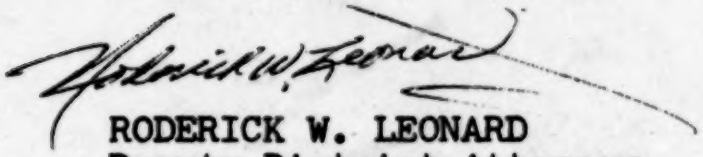

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